U.S. Department of Labor

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Issue date: 27Aug2002

CASE NO.: 2002-CAA-17

In the Matter of:

DAVID L. LEWIS
Complainant

v.

WATER ENVIRONMENT FEDERATION
Respondent

RECOMMENDED DECISION AND ORDER

On April 5, 2002, the complainant filed a complaint alleging violations of Section 322(a) of the Clean Air Act, Section 110(a) of the Comprehensive Environmental Response, Compensation and Liability Act, Section 507(a) of the Federal Water Pollution Control Act, Section 1450 (i)(1) (A-C) of the Safe Drinking Water Act, Section 7001(a) of the Solid Waste Disposal Act, and Section 23(a) of the Toxic Substances Control Act against the Water Environment Foundation (WEF). An investigation was conducted by the Regional Administrator of the Occupational Safety and Health Administration and the complaint was dismissed. Complainant filed a timely request for a hearing and the case was assigned to the undersigned.

In a Recommended Decision and Order issued on April 26, 2002, complainant's complaints under the identical statutes against Synagro Technologies, Inc., Ross M. Patten, and Robert O'Dette in 2002-CAA-12 and 2002-CAA-14 were dismissed by the undersigned because the respondents were not covered employers under the applicable statutory provisions and this court therefore lacked jurisdiction to hear the case.[1] Although the instant complaint is brought against WEF rather than the respondents in the prior proceeding, the jurisdictional issues appeared to be similar if not identical. On May 15, 2002 I issued an order directing the parties to submit briefs on whether the court has jurisdiction to hear this case. The parties have filed timely briefs.

Respondent is a worldwide non-profit organization that engages in a multifaceted education program that provides factual, scientific, and engineering information on water quality to the general public. In 1992 respondent and the Environmental Protection Agency (EPA) entered into a cooperative agreement which in part provides educational materials about biosolids

[1] The Recommended Decision and Order also dismissed the complaint in 2002-CAA-8 because the parties had reached a settlement agreement.

for professionals and the general public. Under this cooperative agreement, EPA funds various projects advanced by respondent related to public acceptance of biosolids. Both employees of EPA and respondent serve on the National Biosolids Partnership and several EPA employees serve on respondent's committees.

Complainant is a research scientist employed by the EPA. On February 13, 2002, Dr. Albert C. Gray, Deputy Executive Director of respondent, sent a letter to Christine Todd Whitman, an EPA administrator, voicing concerns respondent had with several of complainant's research articles.

In *Lewis v. Synagro Technologies, Inc.*, 2002-CAA-8, 2002-CAA-12, 2002-CAA-14, RD&O (ALJ April 26, 2002), I dismissed complainant's whistleblower complaints against respondents because complainant was unable to establish a common law employment relationship, a joint employment relationship, or a "relevant nexus" between EPA and the respondents. In the instant claim, complainant asserts that there is a "relevant nexus" between the EPA and respondent.

To establish that a named party respondent who is not the complainant's immediate, common-law employer is nevertheless a covered "employer" for purposes of liability under the CAA, a successful complainant must establish the existence of a "relevant nexus" between the respondent in question and the complainant's immediate employer. *Williams v. Lockheed Martin Energy Systems, Inc.* (ARB Jan. 31, 2001) (citing *Varnadore v. Oak Ridge National Laboratory*, 92-CAA-2 (ARB June 14, 1996). Such an employment relationship has been found in limited circumstances and the cases of *Hill v. TVA*, 87-ERA-23 and 24 (Sec'y Dec. and Ord. of Remand, May 24, 1989) and *Stephenson v. NASA*, 94-TSC-5 (ARB, July 18, 2000), are controlling.

The complainants in *Hill* were former employees of the Quality Technology Company (QTC). QTC had a contract with respondent, Tennessee Valley Authority (TVA), a licensee of the Nuclear Regulatory Commission (NRC), to develop and implement a program for the identification, investigation, and reporting of respondent's employees' concerns regarding safety issues at TVA's nuclear power plants. Complainants alleged that TVA violated the ERA by restricting the scope of its contract with TVA and ultimately terminating employment, in retaliation for complainants' investigation and disclosure of safety violations in TVA's nuclear power program. *Hill v. TVA*, 87-ERA-23 and 24 (Sec'y Dec. and Ord. of Remand, May 24, 1989). After reviewing the legislative history of the ERA, the Secretary determined that under the specific facts of the case, the complainants may file suit against TVA. *Id.*

In *Stephenson*, complainant was an employee of Martin Marietta Corporation (Martin) and worked at the Johnson Space Center in Texas under Martin's contract with respondent, National Aeronautics and Space Administration (NASA). Complainant filed a complaint against NASA and Martin alleging that NASA prevented her from doing her job in retaliation for complaining about the safety of certain chemicals used aboard the space shuttle. *Stephenson v. NASA*, 94-TSC-5 (ARB, July 18, 2000). The Administrative Review Board explained that, depending upon specific facts of a

case, an employment relationship may exist where an entity, albeit not a direct or immediate employer, is nonetheless a covered employer. *Id*.

In *Hill* and *Stephenson* an employment relationship existed where respondent's action interfered with complainant's employment. Such an employment relationship may apply where a parent company or contracting agency "acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding employee's compensation, terms, conditions or privileges of employment." *Stephenson v. NASA*, 94-TSC-5, D&O of Remand (ARB, April 7, 1997). Therefore, to establish jurisdiction, the respondent must have the power to change the terms or conditions of complainant's employment.

While respondent and EPA work together to advocate the public acceptance of biosolids use, there is no "relevant nexus" to establish respondent as a covered employer for purposes of liability under the CAA. Complainant asserts that respondent works "jointly" with EPA in biosolids programs, is funded by EPA, and employees of both entities serve on various committees together. However, these allegations fail to show that respondent has any ability to influence the conditions of complainant's employment with EPA. Respondent is not a contracting agency with the capability of controlling or changing the terms, conditions, compensation, or privileges of complainant's employment. Furthermore, there are no facts to support that EPA is subordinate to respondent.[2] Therefore, WEF is not a covered employer under the CAA.

In a Motion for Jurisdictional Discovery, Complainant also requests that in the event that the court finds that there are not sufficient facts to establish jurisdiction, he should be permitted to engage in limited discovery. Complainant asserts that there is sufficient preliminary evidence to pursue jurisdictional discovery in deposing Dr. Gray and a small group of respondent's employees to further develop jurisdiction. Respondent filed a reply to the motion. Respondent argues that allowing limited discovery is unnecessary and will pose an undue burden and expense.

Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding. 29 C.F.R. § 18.14(a). The information sought to be discovered does not have to be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 29 C.F.R. § 18.14(b). An administrative law judge is given wide discretion in limiting discovery and his rulings will be reversed only when arbitrary or an abuse of discretion. *Robinson v. Martin Marietta Serv. Inc.*, 1994-TSC-7, Final Dec. & Ord. (ARB Sept. 23, 1996).

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[2] Complainant also points to cases under the National Labor Relations Act (NLRA) which extend liability beyond a proximate employer-employee relationship. Case law under the NLRA is not controlling in this court. Furthermore, I do not find this case law persuasive authority.

None of the allegations contain in complainant's complaint establishes an employee-employer relationship. Deposing these individuals will not solicit facts that will establish an employee-employer relationship.[3] Allowing complainant limited discovery in order to establish jurisdiction will not change the deficiency in his pleadings, i.e., respondent is not a covered employer under the applicable whistleblower statutes. Therefore, complainant's request for limited discovery is denied. *See Johnson v. Oak Ridge Operations Office*, 1995-CAA-20, Final Dec. & Ord. (ARB Sept. 30, 1999)(finding that [d]iscovery would not have changed the speculative bases of [c]omplainants' assertion that they engaged in activity protected by the CAA, SWDA, SDWA, or CERCLA").

ORDER

IT IS ORDERED that complainant's Motion for Jurisdictional Discovery is DENIED.

IT IS FURTHER ORDERED that respondent's Motion to Dismiss is GRANTED.

A

DANIEL L. LELAND
Administrative Law Judge

DLL/es/kmj

[3] This court finds it extremely unlikely that Dr. Gray or any other individual employed by WEF will testify during deposition that they have the capability to change the terms or conditions of an EPA employee's employment.